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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 349

SABENA BELGIAN WORLD AIRWAYS
(SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIATION AERIENNE),

Petitioner,

v.

JACQUES L. LEROY, Administrator *Ad Prosequendum* of the Estate of PAUL LEROY Deceased and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY, Infants,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE WARNER CLARK,
JOHN D. CALAMARI,
MARTIN FOGELMAN,
MATTHEW J. CORRIGAN,
Counsel for Petitioner,
27 William Street,
New York, N. Y. 10005.

New York, July, 1965

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SABENA BELGIAN WORLD AIRWAYS (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIATION AERIENNE),

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v.

JACQUES L. LEROY, Administrator *Ad Prosequendum* of the Estate of PAUL LEROY, deceased and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY, Infants,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 31, 1965.

Citations to Opinions Below

The memorandum opinion of the District Court with respect to petitioner's motion for a new trial and for reargument of its motion to set aside the verdict is unreported

and is printed in Appendix B hereto, *infra*, p. 36a (Appendix to Defendant's Brief below [hereafter, DA], 136a-137a). The memorandum opinion of the District Court with respect to damages is unreported and is printed in Appendix B hereto, *infra*, p. 38a (Appendix to Plaintiff's Brief below [hereafter, PA], 15a-22a).

The opinions of the United States Court of Appeals for the Second Circuit are reported at 344 F. 2d 266, and are printed in Appendix B hereto, *infra*, p. 6a, 34a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1965. R 71a;[1] Appendix B herein, *infra*, p. 45a. Rehearing was denied on April 21, 1965. R 92a; Appendix B herein, *infra*, p. 47a. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

I.

Whether the court at a pre-trial hearing should rule on admissibility of evidence in advance of the trial, and if so, whether the District Court trying the case is bound by such ruling, or whether it should exercise its own discretion as to admissibility of evidence.

II.

Whether a foreign international airline, in a negligence action against it arising out of a crash covered by the Warsaw Convention wherein there were no survivors, is entitled to a charge to the jury that, because of human in-

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[1] "R" refers to the record as certified to this Court by the Court of Appeals.

stinct of self-preservation and the disposition of men to avoid personal harm, the captain of the airplane, and other members of the crew, are presumed to have acted with diligence and due care.

Statutes and Rules Involved

The statutory provisions involved are: The Convention for the Unification of Certain Rules Relating to International Transportation by Air (The Warsaw Convention), 49 Stat. 3000, United States Treaty Series 876; and 62 Stat. 945, 28 U.S.C. § 1732; and 62 Stat. 946, 28 U.S.C. § 1733; and Fed. Rules Civ. Proc. Rules 16 and 44. They are printed, so far as material, in Appendix A hereto, *infra*, pp. 1a-5a.

Statement

On February 13, 1955 a Sabena Belgian World Airways DC-6 airplane, enroute from Florence to Rome in Italy, crashed into the side of a mountain northeast of Rome. Instead of flight plan cross winds of 70 knots (DA 81a) the airplane may have encountered winds of 135 knots (DA 97a) to 155 knots (DA 115a). Everyone on board was killed. Respondent, as administrator *ad prosequendum* of the estate of one of the passengers, commenced an action against Sabena, a national airline of the Kingdom of Belgium. Sabena's liability is governed by the Warsaw Convention because decedent was on an international flight (DA 60a; 123a). The Warsaw Convention, insofar as is here material, provides that the maximum monetary liability of a carrier thereunder (abont $8,300) shall not apply if the damage was caused by the wilful misconduct of the carrier. (Warsaw Convention, Article 25 (1).) The jurisdiction of the District Court was invoked because of diversity of citizenship.

Pursuant to the Warsaw Convention, the District Court directed a verdict against petitioner for the maximum liability in the absence of wilful misconduct (computed at $8,300.00) and submitted to the jury the question of petitioner's wilful misconduct (DA 122a; 125a). The jury found that there was such misconduct (DA 133a) and, after a separate trial without a jury on the issue of damages, the District Court awarded respondent Two Hundred and Five Thousand, Seven Hundred and Five Dollars ($205,705.00) (PA 15a-22a). A judgment in that amount was entered on March 18, 1964 (DA 138a), after petitioner's motion for a new trial and for reargument of its motion to set aside the verdict was denied.

Both parties appealed to the Court of Appeals, which Court affirmed the judgment but remanded the case to the District Court for recomputation of the damages. On April 21, 1965 the Court of Appeals amended its opinion (Appendix B herein, *infra*, p. 34a; R 96a, 97a) and denied the Petition for Rehearing (Appendix B herein, *infra*, p. 47a; R 92a).

At the trial, respondent sought to establish wilful misconduct by introducing in evidence Exhibit 15 (Appendix C herein, *infra*, p. 48a), from which respondent sought to infer that petitioner's crew falsely reported the airplane's position to the Rome controller when the aircraft reported it passed a beacon located at Viterbo, Italy. It is indisputable that there would have been insufficient evidence of wilful misconduct had Exhibit 15 been excluded (Appendix B herein, *infra*, p. 36a).

Exhibit 15 is a copy of part of an Appendix to a report prepared by the Italian Government in connection with its investigation of this accident. That Appendix, in turn, is allegedly based upon a recording of conversations made at the time of the flight and the crash, to which had been added interpolated matter. Neither the recording itself, nor the Appendix to the Italian Government's report, were

themselves offered in evidence. The official at the Rome airport who supposedly heard and recorded the conversation did not testify as to the authenticity of the recording, Appendix, or Exhibit.

At a pre-trial hearing, Judge Bonsal ruled that Exhibit 15 was admissible (DA 136a). At the trial, and after hearing the offer of proof, Judge Murphy indicated that he would not have admitted the Exhibit, but because of the pre-trial ruling he felt obligated to admit it into evidence (DA 74a; 136a). Petitioner contends that the admissibility of the Exhibit was a matter for the discretion of the Trial Judge, and should not have been determined at pre-trial. Further, and in any event, the Exhibit was not required to have been admitted by the Trial Judge on the basis of the pre-trial ruling, nor, much less, as the Court of Appeals suggested, was it required to be admitted as matter of law.

Reasons for Granting the Writ

1. The important question, never considered by this Court—*viz.*, to what extent a trial judge is bound by a ruling of the pre-trial judge with respect to admissibility of evidence [and, even more fundamentally, whether a pre-trial judge should rule on questions of evidence]—is presented herein.

2. There is conflict in the decisions. In Moore's Federal Practice, Second Edition, § 16.16, Volume 3, page 1122 Professor Moore states "The admissibility of evidence may be ruled on at pre-trial." In accord are *Aley* v. *Great Atlantic & Pacific Tea Co.*, 211 F. Supp. 500, 503 (W. D. Mo., 1962; admissibility of evidence may be ruled on "definitively" at pre-trial); *United States* v. *Certain Tracts of Land*, 57 F. Supp. 739 (S. D. Cal., 1944; *Volk* v. *Paramount Pictures, Inc.*, 91 F. Supp. 902 (D. Minn., 1950). However, *Lynn* v. *Smith*, 281 F. 2d 501 (3d Cir. 1960), and

Fidelity and Casualty Company of New York v. *Frank*, 227 F. Supp. 948 (D. C. Conn. 1964), are to the contrary.

It is suggested in the *Lynn* case, *supra* (p. 507), that admission of unsworn matter in evidence at pre-trial opens a Pandora's Box not in contemplation by those who so wisely conceived pre-trial procedures as a medium of expediting the trial of cases and not as a substitute for the regular trial process.

In this case Pandora's Box was opened: The court at pre-trial ruled that Exhibit 15 was admissible. The Trial Court stated that, in his opinion it was not admissible, but he did admit it because he felt bound by the ruling at pre-trial (and because the plaintiff was lulled by the pre-trial determination into a false sense of security). A determination by this Court as to whether the admissibility of such evidence should be passed upon at pre-trial would clarify the existing problem of whether a trial judge is bound thereby, or to what extent he is so bound (See *Aley* v. *The Great Atlantic & Pacific Tea Co., supra; Payne* v. *S. S. Nabob*, 302 F. 2d 803 [3d Cir., 1962], *cert. den.* 371 U. S. 870 [1962]; *Clark* v. *Pennsylvania Railroad Co.*, 328 F. 2d 591 [2d Cir. 1964]; *Dictograph Products Company* v. *Sonotone Corporation*, 230 F. 2d 131 [2d. Cir. 1956], *cert. den.* 352 U. S. 883 [1956]). Such determination also would obviate any question of parties being lulled, by a pre-trial order on the admissibility of evidence, into a sense of security.

Pre-trial practices are constantly being examined and improved. See N. Y. Times, June 23, 1965, Vol. CXIV, No. 39,232 p. 13, col. 2. The importance of having this Court determine the scope of pre-trial insofar as concerns the admissibility of evidence was noted by the District Court: "If pre-trial orders are going to have any validity or if pre-trial orders are as good as some claim they are, this is an ideal case to test their efficacy." Appendix B herein, *infra*, p. 37a.

3. The general rule with respect to admissibility of evidence is that it is ordinarily a matter within the discretion of the trial court. *Spring Co.* v. *Edgar*, 99 U. S. 645 (1878); *Independent Nail and Packing Co.* v. *Mitchell*, 343 F. 2d 819 (1 Cir., 1965). The same rule applies to questions of admissibility under 28 U.S.C. § 1732. *Puggioni* v. *Luckenbach Steamship Company*, 286 F. 2d 340 (2d Cir., 1961).

It is particularly true with respect to accident reports that the trial court should exercise its discretion in determining whether the document has an inherent "probability of trustworthiness." *Palmer* v. *Hoffman*, 318 U. S. 109, 113-114 (1943); *Central Railroad Co.* v. *Jules S. Sottnek Co.*, 258 F. 2d 85, 88 (2d Cir., 1958), *cert. den.* 359 U. S. 913 (1959). In this case, as the opinions below show, there were many facets to the question of probability of trustworthiness before the Trial Court:

(a) The transcript goes beyond the original alleged recording of voices by:

(i) indicating alleged times of transmission (DA 71a-72a);

(ii) indicating alleged identity of the parties (DA 72a);

(iii) including, untranslated from the Italian language, two entries which could not have been on the original recording, each prefaced by the word "note" (See the lines at 1839 and 1848, Appendix C, *infra*, pp. ; DA 72a-73a).

(b) Alleged communications from a flight of another airline (Swissair), included in Exhibit 15, are inadmissible under the doctrine of *Johnson* v. *Lutz*, 253 N. Y. 124, 170 N. E. 517 (1930), because the alleged statement of the Swissair flight that the Viterbo beacon was operating constitutes multiple hearsay (DA 72a). *Gencarella* v. *Fyfe*,

Railway Company, 327 F. 2d 249 (6th Cir.; 1964), *cert.* 171 F. 2d 419 (1st Cir.; 1948); *Dilley* v. *Chesapeake & Ohio den.* 379 U. S. 824 (1965).

(c) The alleged recording of the ground to air conversations was not offered in evidence. Had it been offered, the Trial Court indicated it would have excluded it in its discretion because "plaintiff obviously failed to lay any foundation for its admission and could not without the presence of a number of Italian Government witnesses or their depositions" (DA 136a; 70a-74a; Appendix B herein, *infra* p. 36a). The recording was thus not properly authenticated, and, of course, it follows that neither the Appendix to the Government report, nor the Exhibit, were properly authenticated either as an official record (28 U.S.C. § 1733, Rule 44(a)) or as an entry in the regular course of business (28 U.S.C. § 1732). See 58 A.L.R. 2d 1024 (1956).

Respondent's submission to the Court of Appeals of an allegedly certified and authenticated transcript of the conversations, which transcript was not offered at the trial, is highly improper. Apart from the fact that omissions of proof may not be supplied on appeal (*Thomson* v. *Gaskill*, 315 U. S. 442, 446 [1942]; *Bono* v. *United States*, 113 F. 2d 724 [2nd Cir., 1940]), here the fact is that the Italian Government does not certify as to such matters to private litigants, and the supposed document offered to the Court of Appeals was, we submit, spurious. (See Appendix D, annexed hereto, *infra*, p. 52a.)

It should be noted that if the government report of the accident were a report of the United States Civil Aeronautics Board, it would have been inadmissible in evidence. 49 U.S.C. § 1441(e).

(d) There is no evidence that what was on the recording has been transferred, completely and accurately, to the Appendix, much less to the Exhibit (PA 11a, Interrogatory No. 25).

(e) Exhibit 15 indicates that the Instrument Landing System was operating. However, the "notam" quoted in Exhibit 5 indicates that it was functioning only on an experimental basis, which is a significant matter for a commercial airline, which would not utilize an "experimental" system.

(f) The trial court's conclusion that the Exhibit was inadmissible, but that it would be admitted nevertheless because of the pre-trial ruling, made it ludicrous for counsel to present additional factors relating to authenticity or trustworthiness—e.g., to develop further that the Italian Government, since it operated the Viterbo beacon, had a personal interest in the matter (DA 97a).

Judge Murphy heard evidence on untrustworthiness, both inherent in the Exhibit and extrinsic (as outlined above), and did not trust the Exhibit (Appendix B herein, *infra*, p. 36a). The Court below has abrogated this vital discretionary role of the trial judge.

Thus the decision of the Court below was not only in error, but the case presents for review important novel questions of pre-trial practice.

4. The Second Circuit is in conflict with the Tenth and District of Columbia Circuits upon another important and recurring question in accident cases generally, and in aviation cases in particular. Petitioner unsuccessfully requested a charge to the jury that "Because of the human instinct of self-preservation and the disposition of men to avoid personal harm, Captain Stolz, First Pilot McNamara and other members of the crew are presumed to have acted with due diligence and care." (Request to Charge No. 32; DA 129a; 133a.) The Court of Appeals in this case held that the District Court was not required "to include such common sense in his charge to the jury" (Appendix B, herein, *infra*, p. 21a). In the Tenth and District of Columbia Circuits, this would have been clear error. *Bratt* v. *Western Air Lines*, 169 F. 2d 214, 216 (10 Cir., 1948);

Eastern Air Lines v. *Union Trust Company*, 221 F. 2d 62 (D. C. Cir., 1955) rev'd in part and modified 350 U. S. 907, 962 (1955). The conflict in circuits on this vital point of modern law should be considered by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York, July, 1965.

APPENDIX A

Statutes and Rules Involved

THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR (THE WARSAW CONVENTION) 49 STAT. 3000, UNITED STATES TREATY SERIES 876.

Article 20(1)

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 22(1)

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Article 25(1)

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

28 U.S.C. § 1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record,

whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or copy thereof which is otherwise admissible under the rules of

evidence. As amended Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Publ. 87-183, 75 Stat. 413.

§ 1733. Government records and papers; copies

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof. June 25, 1948, c. 646, 62 Stat. 946.

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the

pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Rule 44. Proof of Official Record

(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record

or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172—September Term, 1964.

(Argued November 17, 1964 Decided March 31, 1965.)

Docket No. 29044

JACQUES L. LEROY, Administrator and Prosequendum of the Estate of PAUL LEROY, deceased, and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY,

Plaintiff-Appellee-Appellant,

—v.—

SABENA BELGIAN WORLD AIRLINES (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE),

Defendant-Appellant-Appellee.

Before:

LUMBARD, *Chief Judge,*

MEDINA and MARSHALL, *Circuit Judges.*

Appeal from a judgment for the plaintiff in a tort action brought in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, on behalf of the children and the estate of a passenger killed in the crash of one of the defendant's planes.

Affirmed and remanded for recomputation of the award.

Appendix B.

ARTHUR R. STELLJES, New York, N. Y. (Joseph Kelner, Stelljes & Stelljes, New York, N. Y. on the brief), *for plaintiff-appellee-appellant.*

MATTHEW J. CORRIGAN, New York, N. Y. (Thomas W. Wilson, Mendes & Mount, New York, N. Y., on the brief), *for defendant-appellant-appellee.*

LUMBARD, *Chief Judge*:

On February 13, 1955, a Sabena Belgian World Airways DC-6 crashed into the side of a mountain northeast of Rome, killing everyone aboard. This suit was brought against Sabena in the District Court for the Southern District of New York on behalf of the estate and children of one of the passengers, Paul LeRoy.

Because LeRoy was on an international flight, Sabena's liability is governed by the Warsaw Convention, 49 Stat. 3000 (1934). Sabena therefore could avoid liability only by showing that "all necessary measures to avoid the damage" were taken. On the other hand, however, on the facts of this case, the plaintiff's recovery is limited to $8,300 unless he establishes that Sabena was guilty of wilful misconduct.

Judge Murphy directed a verdict for the plaintiff for $8,300, but the question of wilful misconduct was submitted to a jury, which resolved it in the plaintiff's favor. After a separate trial, without a jury, on the question of damages, Judge Murphy awarded $205,705. Both parties have appealed.

Sabena contends that the district court erred in admitting certain evidence and in its instructions to the jury. The plaintiff argues that it was error to take account of federal

and state income taxes in estimating Paul LeRoy's future net earnings and that the method used to discount the contributions which LeRoy would have made to his family to their present value was incorrect. We find no error in the rulings of the district court. However, as we find that the district court should have computed the award on somewhat different principles, we remand the case for recomputation of the award.

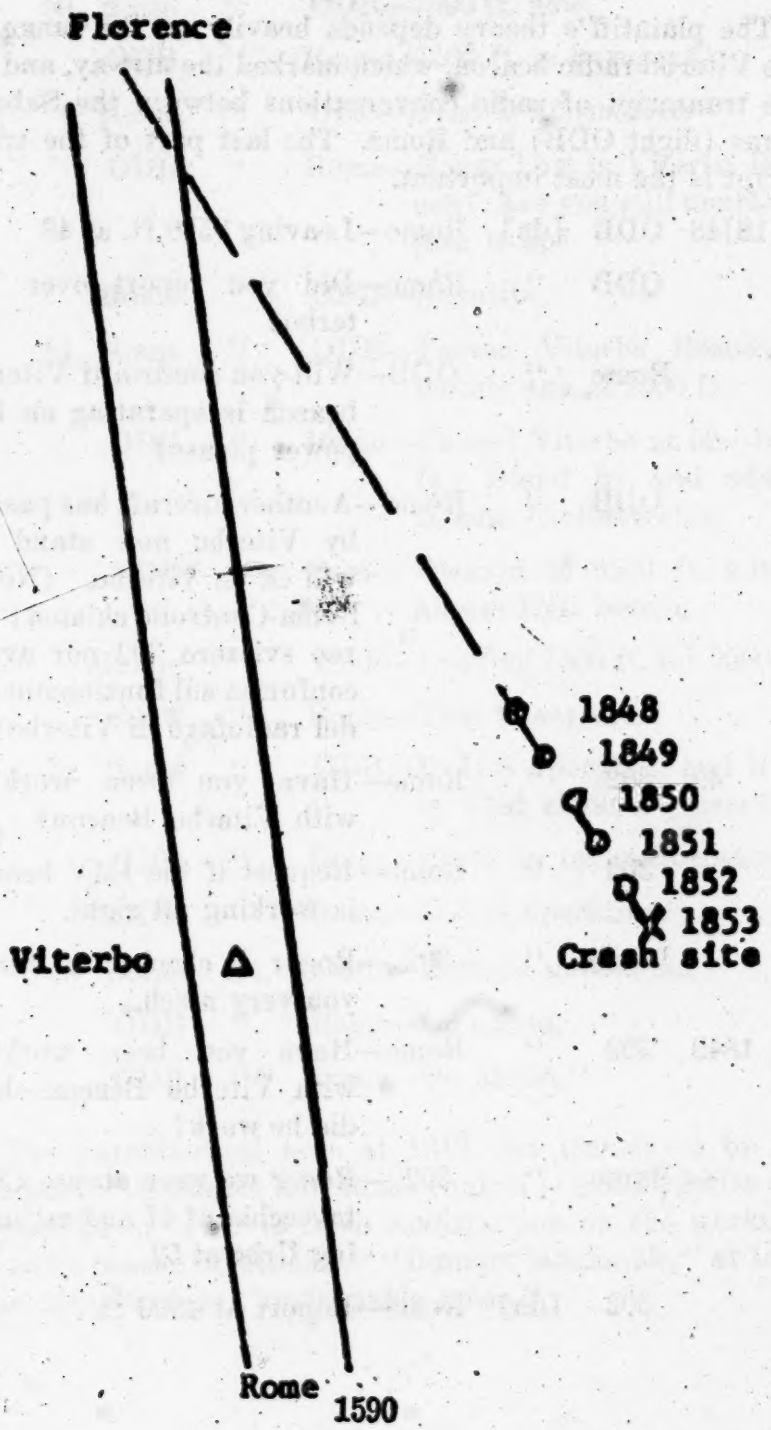
I. Wilful Misconduct

The Sabena plane crashed on the last leg of a Brussels-to-Rome flight; it should have been flying within a ten-mile wide airway between Florence and Rome. The plaintiff's case begins with the fact that the site of the crash was over 30 miles east of the airway.

The plaintiff does not contend that the plane was off course as a result of wilful misconduct. Rather, he contends that the Sabena crew deliberately mislead the Rome controller as to their position and that the controller therefore authorized a descent which, though it would have been safe within the airway, was fatal over the mountainous country to the east, where the plane was then flying.

The airway and crash site appear in approximate scale on the following diagram. The dashes mark the course taken by the plane under the plaintiff's theory; the numbered circles indicate its hypothetical positions at one-minute intervals just before the crash.

Appendix B.


Florence
1848
1849
1850
1851
1852
1853
Crash site
Viterbo
Rome
1590

Appendix B.

The plaintiff's theory depends heavily on the range of the Viterbo radio beacon, which marked the airway, and on the transcript of radio conversations between the Sabena plane (flight ODB) and Rome. The last part of the transcript is the most important.

"[18]48	ODB	[da]	Rome—Leaving 9500 ft. at 48
	ODB	"	Rome—Did you report over Viterbo?
	Rome	"	ODB—Will you confirm if Viterbo beacon is operating on full power please?
	ODB	"	Rome—Another aircraft has passed by Viterbo now stand by w'll ck on Viterbo. (Nota: Roma-Controllo chiama l'aereo svizzero 302 por avere conforma sul funzionamento del radiofaro di Viterbo).
49	302	"	Rome—Have you been working with Viterbo Beacon?
	302	"	Rome—Request if the IMV beacon is working all right.
	Rome	"	302 —Roger I checked it thank you very much.
1849	302	"	Rome—Have you been working with Viterbo Beacon—how did he work?
	Rome	"	302 —Roger we were abeam Civitavecchia at 47 and estimating Urbe at 52.
	302	[da]	Rome—Report at 4000 ft.

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50	Rome	"	ODB—7500 ft. now.
	ODB	"	Rome—7500 ft. is it roger?
	Rome	"	ODB—That is affirmative.
	ODB	"	Rome—Roger how is Viterbo Beacon? Are you still unable to pick it up?
	Rome	"	ODB—Negative.
51	Rome	"	ODB—Passed Viterbo Beacon 1 minute ago at 7500 ft.
	ODB	"	Rome—Passed Viterbo at 50—7500 ft. Stand by and advise Abeam Civitavecchia.
	ODB	"	Rome—Cleared to 5500 ft. advise abeam INR beacon.
	Rome	"	ODB—Leaving 7500 ft. for 5500 ft.
	ODB	"	Rome—That is correct.
52	Rome	"	ODB—Is ILS operating and if so in what channel please?
	ODB	"	Rome—Stand by for confirmation.
	ODB	"	Rome—ILS is operating.
53	Rome	"	ODB—Rumore indefinible.
	ODB	"	Rome—Go ahead.
	ODB	"	Rome—Go ahead."

The parenthetical note at 1848 was translated by the plaintiff's translator as "Rome control is calling Swiss airplane 320 in order to have confirmation on the workings of radio beacon of Viterbo." "Rumore indefinible," at 1853, was translated as "undefinable noise."

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The plaintiff's theory is that the noise at 1853 was produced when the plane's external antenna struck trees on the mountainside. Since the plane had reported passing Florence, 114 nautical miles way, 24 minutes earlier and the speed of a DC-6 in descent is about 285 knots, the plane must have followed a straight line from Florence to the crash site, and its position from 1848 to 1853 must have been as indicated on the above diagram. This inference receives some support from the line of the swath cut by the plane as it crashed through the trees.

The plane's hypothetical position at 1850, when its crew reported that it passed the Viterbo beacon, is more than 30 miles from the beacon. The plaintiff's witness testified, however, that the maximum range at which a radio compass would home on the beacon was only about 22 miles. It is the plaintiff's contention that the Sabena crew falsely reported their position—since their report implied at least that they had obtained a radio compass bearing on the beacon[1]—in order to avoid the delay which the Rome controller would have required if they had reported that they were uncertain of their position.

The plaintiff's theory rests on deductions from indirect evidence, and Sabena offered contrary evidence on essential points, particularly as to the range of the Viterbo beacon. But the inferences required are not unreasonable, and it was for the jury to weigh out the conflicting evidence. Its finding must be accepted unless Sabena was prejudiced by the improper admission of evidence or improper instructions.

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[1] The beacon's identifying signal, which consisted of a steady tone interrupted at intervals by a code, apparently could be picked up at a substantially greater distance than that at which a radio compass would home on the beacon, but the jury could properly have found that the position report did carry the implication that the crew had obtained a radio compass bearing and not merely the signal.

Appendix B.

A. The Radio Transcript

Sabena contends that the radio transcript, designated as exhibit 15, should have been excluded on the ground that it was hearsay and no foundation had been laid for its admission. The transcript is several stages removed from the conversation which is alleged to have taken place on February 13, 1955. The conversation was recorded at the time; a transcript was made from the recording as part of the Italian government's investigation of the crash and was included as an appendix to its report; exhibit 15 is a copy of that transcript. Analysis of its admissibility requires tracing back this chain:

First, if the appendix to the accident report would have been admissible, was exhibit 15 admissible? Second, if the original recording would have been admissible, would the appendix have been admissible? Third, would the original recording have been admissible? In addition, a further issue arises from the fact that Judge Murphy did not consider the exhibit's admissibility *de novo* but based his ruling on a pre-trial ruling by Judge Bonsal that it was admissible.

The first of these questions is the most easily answered. The only objection relevant to this link in the chain is that the exhibit was not certified as required by Rule 44(a) of the Federal Rules of Civil Procedure. But Sabena conceded that there is "no discrepancy" between the exhibit and the appendix to the Italian government's report. Certification could have done no more. Accordingly, exhibit 15 was admissible if the appendix would have been admissible.

Concessions by Sabena also go far toward answering the second question—whether the appendix would have been admissible. Sabena's answers to pre-trial interrogatories establish that the transcript was indeed an appendix to an accident report and that the report was compiled by the Ministerio Difesa Aeronautica of the Italian government.

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That a report has been prepared by a government official or agency does not always require its admissibility. But in most cases in which such reports have been excluded, there has been reason to suspect bias, *Hoffman* v. *Palmer*, 129 F. 2d 976, 991 (2 Cir. 1942), aff'd, 318 U. S. 109 (1943), or the report has contained conclusions or hearsay, *Johnson* v. *Lutz*, 253 N. Y. 134, 170 N. E. 517 (1930), or, in the case of Civil Aeronautics Board accident reports, exclusion has been required by statute, 49 U.S.C. § 1441(e). See generally 153 A. L. R. 163.

Whatever may be in the report as a whole, no conclusions are drawn in the appendix. Nor does Sabena claim that the Italian government was biased in this matter. To the extent that the transcript gives no information not obtainable from the recording, we therefore see no reason for excluding it if the recording itself would have been admissible.

Sabena argues that the transcript does go beyond the recording in certain respects. The most important of these are the notation of the times of transmission; the parenthetical notes, of which one appears at 1848 in the portion quoted above; and the identification of the parties who are transmitting. But the times could be obtained from the recording without difficulty, and the notations do little more than summarize the messages with which they are associated. It is of course possible that the method used to interpolate times was unreliable, but the speculative possibility of error or dishonesty on the part of the government agency in performing such a mechanical task is too minimal to give reason for excluding the document. See *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438, 446 (2 Cir. 1940).[2]

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[2] This is in some ways a stronger case for admissibility than existed in *Banco de Espana*. The defendant in that case apparently had not had access to the original government record, but Sabena con-

The identity of the parties does present a problem but not one relevant to this second question, where we assume that the recording would have been admissible. It is sufficient here to say that the identity of the Sabena flight is explicit and that of the controller is implicit in the text of the messages.

With respect to the recording itself, we think that it was admissible in view of the provisions of 28 U. S. C. § 1732:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

The archetype of the records to which § 1732 was intended to apply is the typical business accounting record, a routine factual entry normally made without reference to anticipated litigation. Because such entries are likely to be accurate and, perhaps more important, because modern

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cedes the accuracy of the copy from the appendix to the accident report and Captain Pierre Dils, then chief pilot of Sabena's European Division, heard the original recording.

business organization makes it impractical to produce in court all the persons directly responsible for the entry, § 1732 and similar state statutes were enacted. See Judge Frank's extensive discussion of such legislation in *Hoffman* v. *Palmer*, 129 F. 2d at 983 et seq.

The statute's rationale is equally applicable to the recording here involved, which was a simultaneous recording made as part of a regular air control procedure. From Sabena's answers to pre-trial interrogatories, the deposition and testimony of Captain Pierre Dils of Sabena, and the undisputed testimony of the plaintiff's expert, Captain Richard Hettenbaugh, it appears that major airports were required to keep either a written or a recorded telecommunications log. The latter type was in use in Italy in 1955, and, as Sabena conceded, "on February 13, 1955, and for a considerable time prior thereto, it was a practice to record communications between airplanes and controlling agencies on the ground, in the country of Italy."

The recording thus was at least the equivalent of a regular written journal kept by the Rome controller[3] and was

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[3] Cf. *State* v. *Meyer*, 37 Wash. 2d 759, 226 P. 2d 204 (1951), in which the transcript from a recording of an interview made in a hospital by an attending doctor was admitted under the state business records statute as part of the hospital clinical record. For some purposes a recording might be equated with the testimony under oath of a third-party auditor of the conversations rather than merely a written record. See 2 Wigmore, Evidence § 669, at p. 790 n. 4 (1940); cases cited in Annotation, 58 A. L. R. 2d 1024, 1041. But cf. *United States* v. *McKeever*, 271 F. 2d 669, 676 (2 Cir. 1959). But the distinction is irrelevant to this discussion since the only substantial objection to admission of the recording is that the recorded statements are themselves hearsay. That objection is not met by equating the recording with the testimony of a sworn witness. Cf. *People* v. *Buckowski*, 27 Cal. 2d 629, 233 P. 2d 912 (1951), cert. denied, 343 U. S. 928 (1952) (recording admitted to show fact that statement was made); *Paulson* v. *Scott*, 260 Wisc. 141, 50 N. W. 2d 376 (1951) (recording admitted under exception for admissions of an adverse party).

a contemporaneous business record. That is all that §1732 purports to require. Despite the section's express reference to hearsay, however, courts have been cautious about allowing admissions of business records where the information was obtained only through hearsay. See, e.g., *Standard Oil Co.* v. *Moore*, 251 F. 2d 188, 212 (9 Cir. 1957), cert. denied, 356 U. S. 975 (1958); *United States* v. *Grayson*, 166 F. 2d 863, 869 (2 Cir. 1948) (L. Hand, *J.*).

The leading case in thus limiting the admission of business records is *Johnson* v. *Lutz*, 253 N. Y. 124, 170 N. E. 517 (1930),[4] in which the report of a police officer was held inadmissible because it was based in large part on the volunteered statements of bystanders. But the statements involved in this case are not the gratuitous reports of persons not involved in the business. If the plane crews were not required to make such reports, it certainly was at least the regular business practice for them to do so. To such reports *Johnson* v. *Lutz* does not apply. See *Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122, 130-31 (2 Cir.), cert. denied, 341 U. S. 951 (1951); *United States* v. *Grayson, supra* (dicta); Note, 48 Colum. L. Rev. 920, 926 (1948). Such reports should be as reliable as the typical business record,[5] and they surely are just the kind of hearsay which, in the words of the statute, "may be shown to affect [the record's] weight, but . . . shall not affect its admissibility."

Moreover, even if the principle of *Johnson* v. *Lutz* is assumed to apply here, the objection based on it can be met on its own terms. Since the objection applies only to "mul-

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[4] The New York provision interpreted in *Johnson* v. *Lutz*, quoted in 253 N. Y. at 126, is the predecessor of C. P. L. R. Rule 4518(a) and is substantially similar to § 1732.

[5] We do not think that the plaintiff's challenge to the truth of one such statement—the Sabena plane's position report at 1851—undercuts the argument for their general reliability.

tiple hearsay," it does not apply to the "rumore indefinible" or to the interpolation of times. Nor does it apply to the statements of the Rome controller, including the identification of their source that is implicit in them; the recording is at least as satisfactory as a written record kept by the controller, and his statements and identification should be no less admissible for having been tape recorded rather than written down.

The transmissions from the Swissair flight, on the other hand, are hearsay, but it is difficult to see how Sabena was prejudiced by their admission. They tend to establish, if anything, that the Viterbo beacon was operating. Since one of Sabena's principal contentions to the jury was that its plane could have picked up the Viterbo beacon at 1850, it could only have been to its advantage to establish that the beacon was operating.

The transmissions from the Sabena plane also are hearsay, but if we can assume that they did in fact come from that plane, they fall within the exception for admissions of an opposing party and therefore do not render the record inadmissible. *Missouri Pacific RR* v. *Austin*, 292 F. 2d 415, 421 (5 Cir. 1961). There was a tentative identification by Captain Dils, who testified that he had listened to the recording and was "practically sure" that he recognized the voice of the particular crew member. In addition, the context of the transmissions makes it highly unlikely, to say the least, that a transmission purportedly coming from the Sabena plane did not in fact do so. We think that the source of the transmissions was sufficiently identified.

The final issue with respect to admission of exhibit 15 arises from the fact that Judge Murphy appears to have admitted it solely on the basis of Judge Bonsal's pre-trial ruling. Whether that was a sound basis for admitting the exhibit is a nice question. It is of course customary for a district judge to follow an earlier ruling by one of his

brothers in the same litigation, though he is not bound to do so. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (2 Cir.), rehearing denied, 231 F. 2d 867, petition for cert. dismissed, 352 U. S. 883 (1956). But despite Professor Moore's flat statement that admissibility may be ruled on at pre-trial, 3 Moore, Federal Practice ¶16.16, at p. 1122 (1964), the efficacy of such rulings necessarily is limited by the first judge's inability to foresee the circumstances of the trial which may be relevant to admissibility. Cf. *Fidelity and Casualty Co.* v. *Frank*, 227 F. Supp. 948 (D. Conn. 1964).

We need not resolve that issue here, however, for this is not a case in which admissibility was a matter within the district court's discretion. We conclude that in this case § 1732 required admission of exhibit 15.

The district court's discretion with respect to § 1732 is a discretion in judging whether the document offered "has an inherent probability of trustworthiness." *Central RR* v. *Jules S. Sottnek Co.*, 258 F. 2d 85, 88 (2 Cir. 1958). It is therefore a necessary premise for its exercise that the document's trustworthiness be in doubt. See *Shenker* v. *United States*, 322 F. 2d 622, 627 (2 Cir. 1963), cert. denied, 376 U. S. 907 (1964) (entry made by employee of party); *Puggioni* v. *Luckenbach Steamship Co.*, 286 F. 2d 340 (2 Cir. 1961) (same); *Central RR* v. *Jules S. Sottnek Co.*, *supra* (accident report based on bystanders' volunteered statements and containing conclusions as to the accident's cause). As we have attempted to demonstrate, however, nothing in the nature or content of exhibit 15 gives any reason to doubt its trustworthiness, and Sabena in all of its argument has suggested no extrinsic circumstances which would raise such doubt. To exclude such a document as exhibit 15 on the mere speculative possibility of error or fraud would frustrate the evident purpose of the statute.

We therefore conclude that there was no error in receiving exhibit 15.

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B. Sabena's Other Objections

Of Sabena's other objections, only two merit discussion. The first is directed at exhibit 7, a pair of United States Air Force maps which together show the Italian peninsula from Florence to Rome. The Florence-Rome airway and the Viterbo beacon appear on the maps, and Captain Hettenbaugh added other markings to illustrate the plaintiff's theory. These consist of a line and numbered circles, as in the above diagram, which indicate the plane's hypothetical course and pre-crash positions; there also are concentric circles around the Viterbo beacon which mark ranges of 10, 15 and 20 miles.

Sabena objected to admission of the exhibit on the grounds that its planes did not use such maps; that the maps' accuracy was not established; more particularly, that they do not show all of the radio facilities in the area; and that the markings were taken only subject to connection and were never connected.

Since the charts were used only to illustrate distances and positions, the only question concerns their accuracy, and Captain Hettenbaugh testified as to that; it is wholly irrelevant whether Sabena ever used such a map. Captain Hettenbaugh also explained his markings, which are amply connected by exhibit 15 and by testimony as to the speed of a DC-6 and the Viterbo beacon's range.

There are some discrepancies between exhibit 7 and another map, a radio chart used by Sabena, as to radio facilities existing in the area. However, Sabena made no reference to the discrepancies when it objected to admission of exhibit 7, and it introduced no evidence relating to them after the exhibit was admitted. Moreover, it was for the jury to decide which of the maps was in error. In sum, Sabena has not established any error in the admission of exhibit 7, much less that there was so substantial an error as to require reversal.

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Sabena's final claim of error is that the district court erred in refusing to charge the jury that, "because of the human instinct of self-preservation and the disposition of men to avoid personal harm," the crew of the Sabena plane "are presumed to have acted with diligence and due care." This is not an unreasonable presumption, and it is supported by a number of cases. But many, perhaps most, of these cases involve use of the presumption by an appellate court in determining whether a jury verdict is supported by the evidence. E.g., *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 62, 72 (D. C. Cir.), rev'd in part *per curiam*, 350 U. S. 907, 962 (1955); *Atchison, T. & S. F. Ry.* v. *Toops*, 281 U. S. 351, 356 (1930). Whether Judge Murphy was required to include such common sense in his charge to the jury is another matter. We do not think that he was.

II. Damages

Judge Murphy concluded that New York would apply the law of the place of the tort, Italy, to the question of damages. He did so with some reservations in view of recent New York conflict of laws decisions. See *Babcock* v. *Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279 (1963). Since both parties presented their cases below on the theory that Italian law governs and neither has raised the issue here, we see no reason to review Judge Murphy's conclusion.

Judge Murphy arrived at the $205,705 award as follows: He found that Paul LeRoy would have earned some $600,000 before retirement in 1993 at age 65. He deducted from this amount 15 per cent for United States and New York income taxes (LeRoy worked in New York) and reduced the balance by 25 per cent to allow for LeRoy's personal expenses. The resulting figure—the estimated contribution that LeRoy would have made to his family—was $382,000.

To reduce this to present value, Judge Murphy averaged the contributions over 37 years and rounded the result to $10,000 per year. The $205,705 award is the present value of annual payments of $10,000 for 37 years.

Although neither party has raised the point, we think it necessary to consistent discussion that a minor arithmetical error in the district court's computations be corrected. The number of years from 1955 to 1993 is not 37 but 38, and for purposes of this discussion we will modify the plaintiff's contentions accordingly. Because this error arose only after the total contribution was computed, it affected only the averaging and discounting.

The plaintiff's first contention is that it was error to deduct estimated federal and state income taxes from LeRoy's future earnings. It is the general rule in this Circuit that, where federal law controls or applicable state law is silent, income taxes should not be considered in estimating future net income. The rule applies to both jury and non-jury trials. *McWeeney* v. *New York, N. H. & H. R.R.*, 282 F. 2d 34 (2 Cir.), cert. denied, 364 U. S. 870 (1960) (jury trial); *Cunningham* v. *Rederiet Vindeggen*, 333 F. 2d 309 (2 Cir. 1964) (non-jury trial).

The defendant has not argued that there is an Italian rule in point, and, in any event, there is nothing in the record to support such an argument. Although each party's Italian law expert testified at some length as to the factors considered in assessing damages, neither made any mention of the effect of income taxes. There was testimony that damage awards under Italian law are intended to compensate for "actual" loss. But this nearly universal principle of damages was expressly held in *Cunningham* not to be a sufficient indication that income taxes are taken into consideration. 333 F. 2d at 313-314.

We therefore conclude that *McWeeney* controls. That case did not lay down a flat rule, however. It left open the

possibility that adjustment for income taxes would be proper if the income were so high that the award would otherwise be excessive, 282 F. 2d at 38, and we subsequently affirmed the existence of this exception in dicta in *Montellier* v. *United States*, 315 F. 2d 180, 186 (2 Cir. 1963). Although in *Montellier* we upheld the district court's refusal to deduct estimated income taxes, we indicated that it could properly have done so on the facts of that case and also that it would have been error not to do so if a sufficiently high income had been at issue.

Whether or not the district court was required to allow for the effect of income taxes in this case, we think that it was at least a proper exercise of its discretion to do so. The estimated future income on which the award was based averaged $16,000 and reached $25,000 for nine years. This compares with an estimated income of $11,150 in *Montellier*, 202 F. Supp. 384, 422, and it contrasts even more sharply with *McWeeney* ($4,800) and *Cunningham* ($6,281—see 60 Adm. 247, S. D. N. Y., April 13, 1962). Certainly the risk that the federal and New York governments will cease to take a substantial portion of a $16,000 income is one of the smaller uncertainties involved in the computations in this case, and the 15 per cent figure adopted by Judge Murphy is a reasonable estimate of what that portion would probably be.

The plaintiff's second contention is that the district court's method of discounting the award to present value was not proper and resulted in too low an award. The plaintiff has not fully developed his position in his brief, but it appears to be substantially as follows: Judge Murphy averaged LeRoy's contributions over the period 1955-1993 (though he used a figure of 37 rather than 38 years), and he discounted the contributions to their 1955 value. The plaintiff's approach, on the other hand, would take account of the fact that 9 of the 38 years had passed by the time

judgment was rendered. In his view, the $382,000 should be averaged over only the remaining 29 years, and the resulting average annual contribution, approximately $13,000, should be discounted only back to 1964. This would give an award of about $234,000.

We agree with the plaintiff's premise that the 38 year period should be treated as having begun in 1955, but we cannot accept the computations which he makes on this basis. It is not that the plaintiff is too generous with himself. On the contrary, this is one of those rare instances in which our view of the award is more favorable to the plaintiff than is the plaintiff's own.[6]

The award in this case is intended to be the financial equivalent of the contributions which LeRoy would have made to his family. It should not simply be the sum of these contributions, however. The award may be regarded as having been paid at the time of judgment, 1964,[7] while it is assumed that the contributions would have been made from 1955 to 1993. As a matter of economics, therefore, each contribution which would have been made prior to the judgment should be increased by the allowance of prejudgment interest from the date the contribution would have been made, while those which would have been made subsequent to the judgment should be discounted back to the date of judgment.

It is not the law of economics that we are applying, however, but the law of Italy. Judge Murphy found that prejudgment interest is allowed under Italian law "only when

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[6] Because we reject the plaintiff's contention with respect to consideration of the federal and state income tax, however, the recovery to which we find the plaintiff to be entitled is less than the amount which he seeks on this appeal.

[7] Payment of the judgment may be delayed, for example, pending appeal, but the addition of post-judgment interest makes the ultimate payment economically equivalent to payment at the time of judgment.

equity would so demand," and he held that it should not be awarded in this case. The plaintiff has not challenged this holding, and, in any event, we cannot say that Judge Murphy's finding as to the application of Italian law is clearly erroneous. The contributions for 1955 to 1964 therefore should enter into the award only at their face value.

In Judge Murphy's calculations, however, these contributions were not merely left at face value; all of the contributions—from 1955 to 1993—were discounted back to 1955. Since no prejudgment interest was allowed, this had the effect of valuing contributions for 1964, for example, at only about seventy-five cents on the dollar, even though they would have been received at approximately the same time as the award.

If Italian law required such a result, we would of course be bound to accept it. But since there has been no suggestion that it does, we think that it was error to ignore economics and the approach of recent cases. See *Conte* v. *Flota Mercante Del Estado,* 277 F. 2d 664, 670 (2 Cir. 1960); *Montellier* v. *United States,* 202 F. Supp. 384, 424 (E. D. N. Y. 1962), aff'd without discussion of this point, 315 F. 2d 180 (2 Cir. 1963); *Tweedy* v. *Esso Standard Oil Co.,* 190 F. Supp. 437, 442 (S. D. N. Y. 1960) (dictum), aff'd *per curiam,* 290 F. 2d 921 (2 Cir. 1961). Contributions which would have been made prior to the date of judgment should enter into the judgment at face value; contributions which would have been made subsequent to the date of judgment should be discounted but only back to the date of judgment.

The final point relates to the averaging of the contributions which LeRoy would have made over the 38 years. The point was not raised by the parties, but because it is to some extent intertwined with the preceding point and should not require introduction of additional evidence on remand, we proceed to consider it.

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Since averaging transfers money from the years of high contributions to the years of low contributions, it would have no effect on the award if all years were treated alike. But it is the purpose of discounting to present value to treat different years differently; discounted at the 3½ per cent rate used by Judge Murphy, a dollar which would have been contributed at the time of the judgment is worth a dollar, one which would have been contributed 10 years later is worth about 71 cents, and one which would have been contributed 29 years later is worth only about 37 cents. See Am. Jur. 2d Desk Book, Doc. No. 132, (1962).

The result is that the transfer of money backward or forward over the years through averaging increases or decreases the award. The change may not be significant where the term of years is short or the difference between the maximum and minimum contributions is not great or where the high and low years are scattered more or less at random over the term. None of these describe the instant case, however.

Judge Murphy made the following projection of LeRoy's income:

"Average Annual Salary in Grade	Period of Years in Grade	Total Earnings in Grade
$ 6,180	1 yr. 2½ mos. to 7/1/56	$ 7,467.50
9,600	8 yrs. to 7/1/64	76,800.00
12,000	8 yrs. to 7/1/72	96,000.00
16,000	12 yrs. to 7/1/84	192,000.00
25,000	9 yrs. to 7/1/93	225,000.00
	Total	$597,267.50"

Averaging the contributions which LeRoy would have made out of these projected earnings shifted many thousands of dollars from the later years to the earlier years and thus substantially affected the award.

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We do not suggest that it is necessary separately to discount the contribution for each year. Contributions for the years prior to the judgment may, as discussed earlier, simply be totaled. Contributions for the subsequent years may be averaged within the income steps indicated in the above projection; it is necessary only that the average not be over so long a term or include so great a range of contributions as seriously to distort the result.

Most of the factual assumptions necessary for recalculation of the award already appear in Judge Murphy's opinion. However, as there is some uncertainty as to whether Judge Murphy would have made the same allowance for income taxes and personal expenses for all of the year if he had been dealing separately with the years of lower and higher income, we remand for recomputation of the award in the light of this opinion.

To summarize, the award should consist of two parts so far as computation is concerned—one for the years prior to judgment and a second for the years subsequent to judgment. The first is simply the sum of LeRoy's projected earnings for the pre-judgment years reduced by what Judge Murphy finds to be a proper allowance for income taxes and personal expenses. The second part begins with the projected earnings for the post-judgment years, which likewise must be adjusted for taxes and personal expenses in order to compute the contributions which would have been made. These contributions must then be discounted to their 1964 value; this discount may be based on the average contributions within each of the income steps projected by Judge Murphy, but averaging the contributions over the full 29 years would not be proper in view of the differences in income over those years.

Accordingly, we remand for recomputation of the award.

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MEDINA, *Circuit Judge* (concurring and, in part dissenting):

In my opinion the judgment should be affirmed with only one very minor change. Accordingly, I concur in the view of the majority that a substantial recovery was warranted, but I dissent from that portion of the majority opinion that remands the case for a recomputation of the award. I shall first discuss two preliminary matters.

I

Exhibit 15

I believe the reasoning adopted by my brothers to support the admissibility of Exhibit 15 is unduly involved and circuitous. The concessions made by Sabena in its answers to pre-trial interrogatories establish that this Exhibit is a composite report compiled by the Department of the Italian Government charged with the duty of preparing such reports in connection with areoplane accidents. As the trial record contains absolutely nothing to challenge the trustworthiness of this composite report or even to indicate that it is in any particular inaccurate, the report was properly received in evidence. Of course the report contains hearsay. But the very purpose of the Federal Business Records Act, 28 U. S. C., Section 1732, is to make such hearsay admissible, subject to proof affecting the probative weight to be given to the document and its contents by the trier of the facts. It is particularly important that the rule be simply stated and easily applied in cases of aeroplane accidents where, more often than not, there are no survivors.

II

The Pre-trial Order

As F. R. C. P. Rule 16 expressly provides that the pre-trial order "when entered controls the subsequent course

of action, unless modified at the trial to prevent manifest injustice," I construe Judge Murphy's ruling as a refusal to modify Judge Bonsal's pre-trial order making Exhibit 15 admissible, but reserving the right of Sabena to introduce proof to contradict it. That a contrary ruling at trial would have caused rather than prevented manifest injustice seems to me to be clear. Judge Murphy's ruling was correct, despite the fact that he mistakenly supposed no foundation had been laid for the admission of Exhibit 15. But this is not to say that a trial judge has no power to change a ruling made at pre-trial. See *Clark* v. *Pennsylvania Railroad Company,* 2 Cir., 1964, 328 F. 2d 591; *Dictograph Prods. Corp.* v. *Sonotone Corp.,* 2 Cir., 1956, 230 F. 2d 131, 134-36, petition for cert. dismissed, 352 U. S. 883.

III

The Measure of Damages

The damage phase of the case is governed by Italian law. The parties so stipulated and the "merely fortuitous circumstance," *Babcock* v. *Jackson,* 1963, 12 N. Y. 2d 473, 480, 191 N. E. 2d 279, 240 N. Y. S. 2d 743, 748, that the plane crashed in Italian territory gives Italy a sufficient connection with this litigation to warrant respect for the agreement of the parties. *Alfieri* v. *Cabot Corp.,* 1962, 17 A. D. 2d 455, 235 N. Y. S. 2d 753, 760, affirmed, 1963, 13 N. Y. 2d 1027, 195 N. E. 2d 310, 245 N. Y. S. 2d 600. Furthermore, no vital New York policy is compromised by a holding that damages be awarded pursuant to Italian law. Cf. *Davenport* v. *Webb,* 1962, 11 N. Y. 2d 392, 183 N. E. 2d 902, 230 N. Y. S. 2d 17. Though the decedent worked primarily in New York he resided in New Jersey. And since the accident in 1955 his widow and infant children, on whose behalf this action was instituted, have lived in Belgium. Cf. *Babcock* v. *Jackson, supra; Kilberg* v. *Northeast Airlines, Inc.,*

1961, 9 N. Y. 2d 34, 172 N. g. 2d 526, 211 N. Y. S. 2d 133; *Pearson* v. *Northeast Airlines, Inc.*, 2 Cir., 1962, 309 F. 2d 553, 557, cert. denied, 1963, 372 U. S. 912, 83 S. Ct. 726, 9 L. E. 2d 720. See generally Annot., 92 A. L. R. 2d 1180.

My principal reason for dissenting from the views expressed by my brothers of the majority on the subject of the computation of the award of damages is that I think their ruling constitutes an unwarranted encroachment on the fact-finding powers of the trial judge.

Judge Murphy could have approached the assessment of damages from a variety of different angles, each of which involved a certain amount of intelligent and reasoned guesswork. The exercise of judicial discretion in such a matter should not be disturbed in the absence of an award shockingly excessive or inadequate or some demonstrated inaccuracy.

The method pursued by Judge Murphy seems to me to be entirely reasonable and the amount he arrived at is neither excessive nor inadequate, except for the mathematical error discovered by my brothers with respect to the use of 37 instead of 38 years in averaging and discounting.

My understanding of the method adopted by Judge Murphy is as follows: *First,* a calculation is made of the full projected earnings until the date of probable retirement, a gross figure of $600,000. This, of course, is on the assumption that Dr. LeRoy lived until 1993, that during this time he was not incapacitated from work by illness or accident, that he continued over the years to display the degree of initiative and ability that marked his efforts as a young man, that his widow did not die or remarry, that the children lived until they attained their majority, that he remained with the same company and did not change his occupation. *Second,* the income taxes were estimated at 15% over the whole period from 1955 to 1993, and 25%

of the remainder was estimated to be the amount that would have been spent by Dr. LeRoy for his own personal needs. Thus the total is reduced to $382,000. *Third,* as this sum averaged out to $10,000 a year for the entire period from 1955 to 1993, Judge Murphy discounted it at the rate of 3½% per annum and arrived at a figure of $205,705. *Fourth,* no "non-patrimonial" damages, for suffering and loss of guidance were allowed, although permissible under Italian law, for the reason that such an allowance "would be purely speculating." *Fifth,* while Italian law allowed pre-judgment interest "where equity would so demand," Judge Murphy found that in this case equity would not so demand and he ruled out pre-judgment interest.

The interrelation of these various elements seems perfectly plain to me. Judge Murphy was not dealing with a mathematical formula. He was endeavoring as best he could to deal with a series of imponderables, just as juries must do in arriving at their verdicts in personal injury and death cases generally. Who can say that 15% or 20% or some other percentage is the proper deduction for income taxes? Was 25% or 30% the proper figure for personal expenditures? Why select 3½% rather than 4% as the rate of discount? Because the subject is not expressly referred to, can it be supposed that an experienced and capable trial judge was unaware of the fact that the $600,000 gross total was based on a series of assumptions as to the continued life and health of Dr. LeRoy and his wife and children and other circumstances above referred to, so favorable to plaintiff as to require some balancing element by way of counterweight? Is it not clear that the reason it would have been inequitable to allow pre-judgment interest, amounting to some $75,000, was that the various assumptions on which the calculations were based were made with knowledge of the fact that no pre-judgment interest would be allowed?

Appendix B.

It is by just such a combination of elements as those weighed by Judge Murphy that a trial judge is supposed to exercise his judicial discretion in the fixing of an award of damages in a case such as the one before us.

And yet my brothers of the majority would ignore the synthesis of these various elements. Thus my brothers single out for disapproval the averaging technique employed by Judge Murphy to compute Dr. LeRoy's potential earnings. They also hold that he *must* segregate the earnings attributable to the period between the date of death and the date of judgment from those that would have accrued between the date of judgment and the date of probable retirement in 1993. And they apparently would give no consideration whatever to the possibilities of death, incapacity or change of occupation of Dr. LeRoy, or the remarriage of the widow or her death prior to 1993.

With all due respect for the views of my brothers, I must dissent. I think the rules which they lay down unduly shackle the broad discretion vested in trial courts to arrive at just results and unrealistically presuppose that once a trial court has set down certain basic figures there is but one way to determine their significance.

Experience has demonstrated that it is absolutely essential to the fair administration of civil justice that trial judges be vested with a very large measure of discretion in fixing recoveries in personal injury and wrongful death actions. See, e.g., *Gardner* v. *National Bulk Carriers, Inc.*, 4 Cir., 1964; 333 F. 2d 676; Prosser, Torts 930-31 (3rd ed. 1964); cf. *National Airlines, Inc.* v. *Stiles*, 5 Cir., 1959, 268 F. 2d 400, cert. denied, 361 U. S. 885 (apparently granting absolute discretion to trial judges). For as was stated in *Whitaker* v. *Blidberg Rothschild Co.*, 4 Cir., 1961, 296 F. 2d 554:

> "Insistence on mathematical precision would be illusory and the judge or juror must be allowed a fair

latitude to make reasonable approximations guided by judgment and practical experience."

An award for personal injuries or wrongful death cannot justly be based solely upon slide-rule computations. A purely mechanical approach is not required as matter of law when, as here, the human elements are so significant as a practical matter and the accumulation of uncertainties is so imponderable.

One final point. My brothers correctly state that Judge Murphy used the figure of 37 years instead of 38 in averaging and discounting. As Judge Murphy rounded off $382,000, the amount of LeRoy's contributions, to $10,000 per year from 1955 to 1993, it is apparent that any error was insignificant as far as concerns averaging. There is, however, a relatively slight difference between the value of a 37-year annuity for $10,000 and one for 38 years. The award should, therefore, be modified from $205,705 to $208,410. With this minor exception, I think the judgment should be affirmed, with costs to the plaintiff.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172—September Term, 1964.

(Argued November 17, 1964 Decided March 31, 1965.)

Docket No. 29044

JACQUES L. LEROY, Administrator *ad Prosequendam* of the Estate of PAUL LEROY, deceased, and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY,

Plaintiff-Appellee-Appellant,

—v.—

SABENA BELGIAN WORLD AIRLINES (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE),

Defendant-Appellant-Appellee.

Before:

LUMBARD, *Chief Judge,*

MEDINA and MARSHALL, *Circuit Judges.*

April 21, 1965

PER CURIAM:

It is ordered that the opinion of this court, filed on March 31, 1965, be amended as follows:

Appendix B.

Strike the second and third sentences of the paragraph beginning on page 1597 of the slip sheet opinion and substitute the following:

> "From the deposition and testimony of Captain Pierre Dils of Sabena and the undisputed testimony of the plaintiff's expert, Captain Richard Hettenbaugh, it appears that major airports were required to keep either a written or a recorded telecommunications log. The latter, which automatically records transmissions to and from the controller, was in use in Italy in 1955."

Between the second and third full paragraphs on page 1606 of the slip sheet opinion, add the following new paragraph:

> "Judge Murphy discounted the contribution at a rate of 3½ per cent. We have held, however, that the discount rate should be at least 4 percent. Alexander v. Nash-Kelvinator Corp., 271 F 2d 524, 527 (2 Cir. 1959). Since there was no evidence that Italian courts would apply a lower rate—indeed, the plaintiff's expert testified that Italian courts use a 5 per cent rate for pre-judgment interest—we think that a rate of not less than 4 per cent must be applied to the future contributions in this case. Cf. Conte v. Flota Mercante Del Estado, 277 F 2d 664, 670 (2 Cir. 1960)."

In the last sentence of the last paragraph of the opinion, add the words "at 4 per cent" after the words "These contributions must then be discounted."

Appendix B.

Memorandum Opinion by Murphy, D.J.

No. 29765

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 117-114

[SAME TITLE]

MURPHY, D. J.

Defendant's motion for a new trial and for reargument of its motion to set aside the verdict has only one substantial point, viz., the introduction in evidence of Exhibit 15, the "transcript" of the Rome airport conversation with the airplane. The motions are denied.

In our opinion Exhibit 15 was the most important piece of evidence in the case and the plaintiff obviously failed to lay any foundation for its admission and could not without the presence of a number of Italian government witnesses or their depositions. We received it into evidence without this necessary proof because in the pretrial order it appears that Judge Bonsal ruled that it was admissible and should be received in evidence with an opportunity to the defendant to offer proof to contradict it.

"The parties also agreed on the following matters: . . . At the request of the attorney for the plaintiff on June 26, 1962, attorneys for both parties appeared before the Honorable Dudley B. Bonsal in chambers at Part 1, of this court and the judge ruled that: the radio transcript of the Italian Government had on 119.3 MCS dated February 13, 1955, affixed to the plaintiff's interrogatories dated August 31, 1960, shall be admitted in evidence reserving the right

of the defendant to introduce evidence contrary thereto. Defendant objects to the ruling and intends to restate its objections at the trial." Pretrial order dated January 4, 1963, pp. 13-14.

If pretrial orders are going to have any validity or if pretrial orders are as good as some claim they are, this is an ideal case to test their efficacy. Cf. Clark v. The Pennsylvania R. R., 2d Cir., decided 2/14/64. We did not admit it merely because Judge Bonsal admitted it but rather because the defendant did nothing about Judge Bonsal's ruling although it was made two years before the trial, thus lulling the plaintiff into a sense of security and preventing him from preparing the necessary foundation for its admission either by calling the Italian witnesses or taking their testimony abroad. It seems to us that the defendant could have done more than sit idly by for two years. It could have made a motion to reargue, using all the objections it now raises and perhaps Judge Bonsal might have reconsidered his ruling.

These are orders. No settlements are necesseary.

U. S. D. J.

Dated, New York, N. Y., March 17, 1964.

Appendix B.

Memorandum Opinion by Murphy, D.J. on Damages No. 29764

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 117-114

[SAME TITLE]

MURPHY, *D.J.*

The parties waived a jury trial on the issue of damages after a jury, to whom the issue of liability was tried, had found the defendant guilty of wilful misconduct. Accordingly, after a hearing, we make the following findings of fact:

Paul Leroy was killed on February 13, 1955, when defendant's airplane crashed on the slopes of a mountain in Italy. He had been on an international flight from New York to Africa and was killed on the second leg of the flight from Brussels to Rome. He was 27 years old at the time and left surviving him his wife, Madeline (of the same age) and two children, Michael Paul, born June 13, 1952, and Christine Marie, born February 28, 1954, and a posthumous daughter, Miren, born July 8, 1955. The decedent, who enjoyed exceptionally good health from birth, was a brilliant student and a promising young geologist; in fact he was on a mission to Africa for his employer, a subsidiary of Kennicott Copper Company, when he was killed.

With some members of his family he migrated in 1940 from Belgium, the land of his birth, to this country and attended high school, college and university in New York,

graduating from each with honors. At Iona College he graduated magna cum laude and at Columbia University, where he took his doctor's degree in geology, he was considered by his professor as an exceptional student and one of the top 10% of those ever graduating from Columbia with the degree of Doctor of Philosophy in Geology. He had worked part time for a subsidiary of the Kennicott Copper Company during his university training and joined the same company upon graduation.

In 1954 when the decedent started his permanent employment with the Kennicott subsidiary he was employed as an Assistant Geologist at a salary of $5,040 a year and at the time of his death in 1955 was receiving a salary of $6,180 a year. We are also persuaded that it was the decedent's intention to live and work in the United States. He received an Honorable Discharge from the United States Army on April 6, 1947, and received his citizenship on March 22, 1951. Although he was married in Belgium in May, 1954, he and his wife lived in New Jersey and had made arrangements prior to his death to buy a home there.

His wife, presently residing in Belgium, is an attractive, educated woman, the daughter of a Belgium in the diplomatic service of his country. It was her testimony that her husband was very handy around the house; was frugal, did not drink, smoke or gamble; their rent was $75 per month and their food for the household was $30 a week; the decedent bought very little clothes and brought his lunch to work; they owned an automobile and he had a $10,000 life insurance policy (there was no evidence as to the costs of these two items). It was also her testimony, and that of his brother, that the decedent was very fond of and attentive to the small children.

There was testimony, which we accept, that the starting salary today for a Doctor of Philosophy in Geology would

be $9,000 and that a Doctor of Philosophy in Geology with nine years experience, such as the decedent would have had had he lived to today, would be receiving somewheres between $14,000 and $18,000 a year. There was other testimony, which we accept, that the following are the grades and average salaries of Kennicott geologists as of today:

Assistant Geologists, who usually stay in that category from three to five years, range between $553 and $820 per month or between $6,636 and $9,840 a year.

Geologists, who usually stay in that grade from five to ten years, range between $614 and $920 per month or between $7,368 and $11,040 a year.

Senior Geologists, who usually stay in that grade from five to ten years, range between $799 and $1,199 per month or between $9,588 and $14,388 a year.

District Geologists (top grade), range from $1,239 to $1,859 per month or between $14,868 and $22,308 a year.

President of a subsidiary in the United States $25,000 a year, and in Canada $27,500 a year.

An analysis of the salaries of fellow employees who started at the same salary as the decedent at or about the same time indicates that one is now getting $11,160 a year; another $16,500 a year; another $11,400 a year and the president of the company $25,000 a year. Accordingly, we find that had the decedent survived and worked for the same company until he retired at the age of 65 he would have received $600,000.

This sum of $600,000 was arrived at by finding that Mr. Leroy would have advanced through the various grades in the following manner:

Appendix B.

Grade	Average Annual Salary in Grade	Period of Years in Grade	Total Earnings in Grade
Asst. Geologist	$ 6,180	1 yr. 2½ mos. to 7/1/56	$ 7,467.50
Geologist	9,600	8 yrs. to 7/1/64	76,800.00
Senior Geologist	12,000	8 yrs. to 7/1/72	96,000.00
District Geologist	16,000	12 yrs. to 7/1/84	192,000.00
President of Subsidiary	25,000	9 yrs. to 7/1/93	225,000.00
	TOTAL		$597,267.50

Taking round figures and because we averaged the length of time in each grade, we adopt a total figure of $600,000.

We have found that Mr. Leroy would be compelled to retire at the age of 65 and thus terminate his employment on July 1, 1993. Since, however, there was no proof offered as to what kind of a retirement plan was in effect or what contributions he would have had to make, we make no provision for any anticipated income after 65, or conversely for any deductions from gross income during the 37 years he might have been contributing to a pension plan. We find, therefore, that his anticipated work and income producing life would end on July 1, 1993, which would be in his 65th year.

Since we find that this is the type of a case where there should be deducted from gross income, income taxes that would normally have been paid (and we do not read McWeeney v. N.Y.N.H. & H.R. Co., 282 F. 2d 34 (2d Cir., 1960) to be contrary to this finding) we have estimated that the United States and New York State taxes (the decedent worked in New York) at the old rates would be approximately $116,000, which is approximately 19% of

$600,000. In view of the facts that this estimate is based on a minimum amount of deductions and exemptions and the lower tax rates now prevailing, it would seem fair to allow 15% to be deducted for taxes; thus the decedent's after tax earnings would be $510,000, i.e., $600,000 minus $90,000. Then by estimating 25% as his share of the "take home amount" of $510,000 there is left approximately $382,000 for the use of the wife and children. Dividing by the 37 years left to his age of retirement the result is approximately $10,000 per year. The present value, using an investment rate of 3½%, would therefore equal $205,705 and, accordingly, we direct that a judgment be entered in favor of the plaintiff in that amount.

Since three infants are involved we determine their respective shares as follows, assuming 96 "support" years:

18 years for Michael Paul	$ 38,700
20 years for Christine Marie	42,855
21 years for Miren	44,999
37 years for Mrs. Leroy	79,151
Total	$205,705

We have computed the damages according to New York substantive law. At the hearing both parties assumed Italian law was applicable and each elicited testimony from Italian legal experts on that subject. Oddly enough both experts agreed on the factors that should be considered in computing compensatory damages (there called patrimonial damages) which are quite similar or identical to New York law.

We are not certain that New York would in this case under its conflicts rule apply Italian law for it would appear that New York has abandoned the traditional rule

that the law of the place of the tort *invariably* governs and has replaced it with one based on a jurisdiction's interest in the outcome of an issue. The mechanics of determining interest is known as the grouping of contacts or "center of gravity" doctrine. The rationale, as expressed in Babcock v. Jackson, 12 N.Y. 2d 473 (1963) is that "justice fairness and the 'best practical result' . . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."

The decedent, although he lived in New Jersey worked in New York for a New York corporation, the ticket for the flight on the Belgium airline was purchased in New York and that airline certainly does a great deal of business in New York.

But assuming that Italian law is applicable on the issue of compensatory damages there is no conflict as to the factors to be considered so we need not concern ourselves with a choice of law. With reference to patrimonial (compensatory) damages there was, however, some conflict between the two Italian experts on how an Italian judge would compute the monetary figure.

With reference to such damages we accept the view of the defendant's expert that a judge in Italy would take into consideration the internal economy of that country and the value of its currency, but we find that such personal considerations are not binding on us as a trier of the facts in this country since the decedent worked in this country for a domestic corporation and was paid in dollars. Accordingly, we do not take into consideration the internal economy of Italy or make any appraisal of its currency vis-a-vis its purchasing power in that country. We do this for another reason too, viz., there was no proof offered as to how it differed from the United States.

Appendix B.

We find also as a fact that non-patrimonial damages (damages for the pain and anguish suffered by the bereaved) would be allowed in this case under Italian law and both experts so agreed. However, we accept the opinion of the defendant's expert that such damages are difficult to assess, in fact we find them too difficult. We would be purely speculating and assess none. Accordingly, whether New York or Italian law is applicable the result is the same.

The Italian experts also disagreed on prejudgment interest. We are satisfied that there is no Italian statute covering this subject and that Article 1282 of the Italian Civil Code is not applicable. We accept the defendant's opinion that prejudgment interest is allowed only when equity would so demand. This is no such case and accordingly we apply the New York conflicts rule (Davenport v. Webb, 11 N. Y. 2d 392 (1962); St. Clair v. Eastern Airlines, Inc., 302 F.2d 477 (2d Cir., 1962), and hold that the plaintiff is not entitled to prejudgment interest.*

The clerk is therefore directed to enter judgment for the plaintiff in the sum of $205,705, without interest.

Let this memorandum stand in lieu of findings of fact and conclusions of law.

THO. F. MURPHY
U. S. D. J.

Dated, New York, N. Y., March 17, 1964.

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* In the wake of *Babcock*, the present status of the rule in *Davenport* is far from certain. In view of the uncertainty created by *Babcock* itself, however, we feel bound to give effect to *Davenport* in the absence of a clear statement by a New York court that it is no longer the law.

Appendix B.

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. HAROLD R. MEDINA,
HON. THURGOOD MARSHALL,
Circuit Judges.

JACQUES L. LEROY, Administrator ad Prosequendum of the Estate of PAUL LEROY, deceased and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY, infants,

Plaintiff-Appellant,

v.

SABENA BELGIAN WORLD AIRLINES (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE),

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Further ordered, adjudged and decreed that the action be and it hereby is remanded to the United States District Court for the Southern District of New York for recomputation of the award in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JACQUES L. LEROY, Administrator ad Prosequendum of the Estate of PAUL LEROY, deceased, and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY,

Plaintiff-Appellee-Appellant,

v.

SABENA BELGIAN WORLD AIRLINES (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE),

Defendant-Appellant-Appellee.

PETITION FOR REHEARING

Mendes & Mount, New York, N. Y.,

for defendant-appellant-appellee.

Petition denied.

J. E. L.,
H. R. M.,
T. M.,
U. S. C. JJ.

21 April 1965

APPENDIX C

COMUNICAZIONI RADIOFONICHE AVVENUTE TRA L'AEREO OO-SDB E ROMA CONTROLLO SULLA FREQ. 119.3 MCS—GIORNO 13 GEBBRAIO 1955

	Stazione chiamata		*Stazione chiamante*	*Testo Messaggi*
1829	Rome	da	OO-SDB	—ODB at 17500 ft. passed Florence at 29 estimating Viterbo at 47
30	OO-SDB	"	Rome	—Roger ODB at 13500 ft estimating Vit. 29 is it OK?
½	Rome	"	ODB	—I say again—passed Florence 29 17500 ft estimating Viterbo at 47
	ODB	"	Rome	—Roger—DB at 17500 ft estimating Vit. 47
31	Rome	"	ODB	—That is affirmative
	ODB	"	Rome	—Cleared to the Rome Beacon Via Viterbo direct to cross Viterbo at 7500 ft—maintain 7500 ft—No delay expected
½	ODB	"	Rome	—Did you get my clearance?
	Rome	"	ODB	—Roger—understand we are cleared to descend and cross Viterbo at 7500 ft—7500 ft—No delay expected and cleared direct Viterbo to Rome Beacon direct—is it correct?
	ODB	"	Rome	—Affirmative—
	Rome	"	ODB	—Roger DB
32	ODB	"	Rome	—Emendament to your clearance you are now to cross Viterbo at 11500 ft and maintain 11500 ft
33	Rome	"	ODB	—Understand to cross Viterbo at 11500 ft.
	ODB	"	Rome	—Maintain 11500 ft

Appendix C.

	Stazione chiamata		*Stazione chiamante*	*Testo Messaggi*
	Rome	da	ODB	—At moment we are still at 17500 ft—17500 ft
	ODB	"	Rome	—Roger at 17500 ft—Pisa altimeter Aetting 1007.0 mbs—Report leaving 17500 ft.
	Rome	"	ODB	—Roger 1007.0 and cleared to desc. to 11500 ft
	ODB	"	Rome	—Report leaving 17500 ft.
34	Rome	"	ODB	—Leaving 17500 for 11500 ft now
	ODB	"	Rome	—Roger leaving 17500 ft at 35—DB hold N.W. of Rome Beacon EAT 1901
35	Rome	"	ODB	—Say it again please?
	ODB	"	Rome	—Hold N.W. of Rome Beacon EAT 1901
	Rome	"	ODB	—Hold Rome beacon EAT 1901
1838	Rome	"	ODB	—Go ahead.
38	Rome	"	ODB	—Did you call DB.
39	ODB	"	Rome	Negative I am trying to contact ZN. (Nota: Roma—Controllo stava chiamando un altro aereo e l'ODB credeva che la chiamata fosse per ess).
42	ODB	"	Rome	—You are cleared to cross Viterbo descending Abeam Civitavecchia 7500 ft. maintain 7500 ft.
43	Rome	"	ODB	—Understand cleared to desc to 7500 ft.
	ODB	"	Rome	—That is affirmative—Report leaving level.
	Rome	"	ODB	—We just *had* 12500 ft.—leaving now.

Appendix C.

	Stazione chiamata		*Stazione chiamante*	*Testo Messaggi*
	NDB	da	Rome	—DB leaving 12500 ft. at 44.
45	Rome	"	ODB	—Is passing 11500 ft.
	ODB	"	Rome	—Roger leaving 11500 ft. at 45
47	Rome	"	ODB	—Is passing 9500 ft.
48	ODB	"	Rome	—Leaving 9500 ft. at 48
	ODB	"	Rome	—Did you report over Viterbo?
	Rome	"	ODB	—Will you confirm if Viterbo beacon is operating on full power please?
	ODB	"	Rome	—Another aircraft has passed by Viterbo now stand by will ck on Viterbo. (Nota: Roma-Controllo chiama l'aereo svizzero 302 per avera conferma sul funz onamente del rad eferoof Viterbo).
49	302	"	Rome	—Have you been working with Viterbo Beacon?
	302	"	Rome	—Request if the IMV Beacon is working all right.
	Rome	"	302	Roger I checked it thank you very much.
1849	302	"	Rome	—Have you been working with Viterbo Beacon—how did he work?
	Rome	"	302	—Roger we were Albeam Civitavecchia at 47 and estimating Viterbo 52.
	302	"	Rome	—Report at 4000 ft.
50	Rome	"	ODB	—7500 ft. now.
	ODB	"	Rome	—7500 ft. is it roger?
	Rome	"	ODB	—That is affermative.

Appendix C.

	Stazione chiamata		*Stazione chiamante*	*Testo Messaggi*
	ODB	da	Rome	—Roger how is Viterbo Beacon? Are you still unable to pick it up?
	Rome	"	ODB	—Negative
51	Rome	"	ODB	—Passed Viterbo Beacon 1 minute ago at 7500 ft.
	ODB	"	Rome	—Passed Viterbo at 50—7500 ft. Stand by and advise Abeam Civitavecchia.
	ODB	"	Rome	—Cleared to 5500 ft. advise abeam INR beacon
	Rome	"	ODB	—Leaving 7500 ft. for 5500 ft.
	ODB	"	Rome	—That is correct.
52	Rome	"	ODB	—Is ILS operating and if so in what channel please?
	ODB	"	Rome	—Stand by for confirmation.
	ODB	"	Rome	—ILS is operating.
53	Rome	"	ODB	—rumore indefinibile.
	ODB	"	Rome	—Go ahead.
	ODB	"	Rome	—Go ahead.

APPENDIX D

Rome, November 30, 1963

MINISTRY OF DEFENSE—AERONAUTICS
Inspectorate of Telecommunications
and of Flight Assistance
Inspector

Atty. Prof. Angelo Piero Sereni
10 Via Toscana
ROME

Subject: Le Roy vs Sabena Belgian World Airlines
Accident: February 13, 1955—Rieti
Request for certificate

This is reply to letter of October 30th on the same subject.

For reasons of principle and in order to observe most rigid objectivity, this Administration does not agree to release proofs or certificates to any party in a pending legal action.

When, for reasons of administration of justice, it is necessary to obtain for the process definite documents or other proofs, this Administration makes them available exclusively at the request of Judicial Authority.

In the particular action here involved, it would therefore be necessary that the Judicial American Authority which desires to acquire information concerning NOTAM in force in Italy at the time of accident under reference, should require the Italian Judicial Authority by means of letters rogatory and the respective documents will be furnished to that authority because they are not covered by military secret.

INSPECTOR OF TELECOMMUNICATIONS

(s) Gen. Mario BUCCHI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 349

SABENA BELGIAN WORLD AIRWAYS (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIATION AERIENNE),

Petitioner,

—v.—

JACQUES L. LEROY, Administrator *Ad Prosequendum* of the Estate of PAUL LEROY, deceased and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY, Infants,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

On February 13, 1955, Dr. Paul LeRoy, a 27 year old American geologist was killed in the crash of a DC-6 airplane owned and operated by Sabena Belgian World Airways. Dr. LeRoy left surviving a widow and three children.

The evidence adduced upon the trial established that the Sabena DC-6 had maintained constant radio voice communcation with an air traffic controller at Rome, Italy during the fatal portion of the flight. The crew had made suspicious transmissions concerning its report over a compulsory reporting point at Viterbo, Italy. The airplane

actually crashed at a site 50 statute miles east of the Viterbo beacon at a time and place from which the crew could not have possibly overflown the beacon.

When the wreckage was located, the heading of the airplane, the time of the crash, the known speed, and the distances were correlated, and all demonstrated beyond cavil that the crew had falsified its position. In fact, the unusual nature of the crew's last transmissions then became patently clear for it was evident that they were hiding their uncertain position from the traffic controller and conveniently making up a reporting time over Viterbo to prevent discovery of violations of airways rules. By proceeding, as aforesaid, the crew avoided penalties for drifting beyond the airways, but in so doing gambled with the lives of everyone on board.

The radio transmissions from the crew further disclosed that they were invoking procedures for which they would have no possible need except to re-locate their position in event that they had falsified it.

Wilful misconduct was proven overwhelmingly. The trial court indicated that there was no question on the merits and the Circuit Court of Appeals concurred that "a substantial recovery was warranted".

It is respectfully submitted that the conduct of the crew was so gross and wanton that a criminal prosecution for manslaughter could probably have been sustained had the crew survived.

After a special verdict in which the jury found wilful misconduct on the part of the Sabena crew, a trial was had before the District Court judge sitting without a jury which resulted in a judgment of $205,705 in favor of the widow and children of Dr. LeRoy.

The Circuit Court of Appeals unanimously held that the judgment should be affirmed and ordered a re-computation to increase the amount of the damages. Judge Medina, in a concurring opinion, dissented partially as to the manner of recomputing the damages only.

The petitioner raises no issue as to the merits of the case in this petition, but alleges that this Court should consider (1) the question of pretrial rulings and (2) whether the trial court should have charged that there was a presumption in law that the crew acted with due diligence. We shall answer these questions in the order presented.

POINT I

The Pre-Trial Ruling

a. *Subject of the Ruling*

Throughout the world, aviation traffic is controlled by very high frequency radio along the airways, using English as the standard language (S. M.* 86, 205, 280, 281, 342, 326). The frequencies are monitored in each traffic control center and recorders, called automatic tele-communications logs, keep a permanent record. This procedure was established by international treaty. (The Chicago Convention, annex 10, Air Navigation Services, Radiotelephony Procedures ICAO Documents 7181-COM/546/4.)

The Court of Appeals acknowledged this undisputed fact (see Petitioners App. B, p. 35a).

> "From the deposition and testimony of Captain Pierre Dils of Sabena and the undisputed testimony of the

---

* S. M. refers to Steno Minutes.

plaintiff's expert; Captain Richard Hettenbaugh, it appears that major airports were required to keep either a written or a recorded telecommunications log. The latter, which automatically records transmissions to and from the controller, was in use in Italy in 1955."

Interested users could obtain transcripts of the log from any governmental agency concerned (S. M. 343).

The plaintiff obtained a sealed copy of the recording from the Italian Air Ministry, which further was an appendix to its accident report.

b. *The Obstructionism of the Defendant, Sabena, Herein*

The defendant had sent four highly skilled advisors to participate in the Italian investigation together with a representative of the Belgian Government (S. M. 238, 239, 246). Sabena was a nationalized airline with the Government owning 51% of its stock (S. M. 202).

Despite the fact that they had spent weeks in Italy listening to the tapes, climbing the mountain to visit the scene, viewing the wreckage, etc., defendant alleges that no one had made any observations whatsoever (S. M. 261). They never made a written or oral report of their observations to anyone (S. M. 247).

On cross-examination it was disclosed that Sabena had taken S-55 type helicopters from Brussels all the way to Italy and then to the wreckage site. The helicoptors were fitted with sensitive altimeters. Sabena claimed it had no idea of the altitude of the crash (S. M. 254 and 248). This was manifestly improbable.

The defendant did, however, rely upon the Italian Government to conduct the investigation of the accident and elicit all the facts (S. M. 265, 267). The defendant's com-

plete reliance upon the Italian Government may be further gleaned from the fact that when they discussed the theory of the accident with the Belgian Government, they had nothing but the Italian Government Report before them (S. M. 272 and 273). They relied upon the appendages of the Italian Government Report to conclude that "the winds were somewhat greater than forecast" (S. M. 272). In responding to the interrogatories in this case they used the Italian Government Report and their Radio Facility Charts (S. M. 265).

At the pre-trial hearings the defendant objected to the introduction of every map, chart, photograph, telecommunications log, weather reports, etc. despite the fact that these documents were records and data kept of all aircraft, *regardless of a crash.*

It was evident that the defendant was bent upon a path of obstructionism to bury every documented fact surrounding the crash.

c. ***The Proceedings Before the Judge at Pre-trial***

Nowhere in the petition submitted to this Court by Sabena does it even mention the sworn interrogatories and depositions taken of the defendant.

Prior to pre-trial, the plaintiff had taken sworn interrogatories and depositions of the defendant in which a copy of the telecommunication log (Exhibit 15) was affixed and the defendant questioned at length upon this exhibit. Any fair reading of the defendant's responses would conclude that the defendant admitted it was a business record and admitted its authenticity.

The plaintiff thereafter, upon written notice to the defendant, sought a ruling at pre-trial as to the admissibility

of the exhibit. The pre-trial judge (Judge Bonsal) ruled the exhibit admissible, reserving the defendant's right to introduce evidence contrary thereto. The pre-trial judge ruled upon the basis of *sworn* interrogatories and depositions before the court upon notice.

d. *The Ruling of the Trial Judge*

The exhibit (15) was introduced into evidence at the trial. The trial Judge (Judge Murphy) admitted it without going behind the basis of the ruling of the pre-trial judge. Judge Murphy said:

> "We did not admit it merely because Judge Bonsal admitted it but rather because the defendant did nothing about Judge Bonsal's ruling although it was made two years before the trial, thus lulling the plaintiff into a sense of security and preventing him from preparing the necessary foundation for its admission either by calling the Italian witnesses or taking their testimony abroad. It seems to us that the defendant could have done more than sit idly by for two years."
>
> (Petitioner's App. B., page 37a)

The trial court did not bother to comment upon the interrogatories and depositions before the pre-trial judge, but rather followed the pre-trial ruling citing the laches of the defendant.

The Court of Appeals did go behind the ruling, however, and examined the record of *both* rulings, upon pre-trial and trial, and held that the exhibit was properly admitted into evidence.

e. *The Question Presented Upon the Petitioner's Writ Is Moot*

The Court of Appeals decided the exhibit was admissible upon the *concessions* made by the defendant in the interrogatories and depositions. The Court of Appeals said:

> "The only objection relevant to this link in the chain is that the exhibit was not certified as required by Rule 44 (a) of the Federal Rules of Civil Procedure. But Sabena conceded that there is 'no discrepancy' between the exhibit and the appendix to the Italian government's report. Certification could have done no more. Accordingly, exhibit 15 was admissible if the appendix would have been admissible.
>
> "Concessions by Sabena also go far toward answering the second question—whether the appendix would have been admissible. Sabena's answers to pre-trial interrogatories establish that the transcript was indeed an appendix to an accident report and that the report was compiled by the Ministerio Difesa Aeronautica of the Italian government."
>
> (Petitioner's App. B, page 13a.)

The Court of Appeals correctly pointed out that the question of pre-trial rulings cannot be reviewed in this case upon appeal, for in this particular instance the trial judge, while correctly following the pre-trial ruling, was *required* to admit the exhibit.

The Court demonstrated that in addition to making concessions as to the document's authenticity, in its answers to sworn interrogatories the defendant further, in all of its arguments below, suggested no extrinsic circumstances which would give reason to doubt the document's trustworthiness. The Court concluded that it would have been error for the trial court to have excluded the document.

The Court of Appeals said (Petitioner's App. B, p. 18a):

"The final issue with respect to admission of exhibit 15 arises from the fact that Judge Murphy appears to have admitted it solely on the basis of Judge Bonsal's pre-trial ruling. Whether that was a sound basis for admitting the exhibit is a nice question. It is of course customary for a district judge to follow an earlier ruling by one of his brothers in the same litigation, though he is not bound to do so. Dictograph Products Co. v. Sonotone Corp., 230 F. 2d 131 (2 Cir.), rehearing denied, 231 F. 2d 867, petition for cer. dismissed, 352 U. S. 883 (1956). But despite Professor Moore's flat statement that admissibility may be ruled on at pre-trial, 3 Moore, Federal Practice Para. 16.16, at p. 1122 (1964), the efficacy of such rulings necessarily is limited by the first judge's inability to foresee the circumstances of the trial which may be relevant to admissibility. Cf. Fidelity and Casualty Co. v. Frank, 227 F. Supp. 948, D. Conn. (1964).

We need not resolve that issue here, however, for this is not a case in which admissibility was a matter within the district court's discretion. We conclude that in this case Sec. 1732 required admission of exhibit 15.

The district court's discretion with respect to Sec. 1732 is a discretion in judging whether the document offered 'has an inherent probability of trustworthiness.' Central RR v. Jules S. Sottnek Co., 258 F. 2d 85, 88 (2 Cir. 1958). It is therefore a necessary premise for its exercise that the document's trustworthiness be in doubt. See Shenker v. United States, 322 F. 2d 622, 627 (2 Cir. 1963), cert. denied, 376 U. S. 907 (1964) (entry made by employee of party); Puggioni v. Luckenbach Steamship Co., 86 F. 2d 340 (2 Cir. 1961) (same); Central RR v. Jules S. Sottnek Co., supra

(accident report based on bystanders' volunteered statements and containing conclusions as to the accident's cause). As we have attempted to demonstrate, however, nothing in the nature or content of exhibit 15 gives any reason to doubt its trustworthiness, and Sabena in all of its argument has suggested no extrinsic circumstances which would raise such doubt. To exclude such a document as exhibit 15 on the mere speculative possibility of error or fraud would frustrate the evident purpose of the statute.

We therefore conclude that there was no error in receiving exhibit 15."

Judge Medina, in a concurring opinion, held that exhibit 15 was admissible because of the concessions made by the defendant in its answers to sworn interrogatories and that this does not alter the right of a trial judge, in a proper case, to change a pre-trial ruling. Judge Medina said (at Petitioner's App. B, page 28a):

"Exhibit 15

I believe the reasoning adopted by my brothers to support the admissibility of Exhibit 15 is unduly involved and circuitous. *'The concessions made by Sabena in its answers to pre-trial interrogatories establish that this Exhibit is a composite report compiled by the Department of the Italian Government charged with the duty of preparing such reports in connection with aeroplane accidents. As the trial record contains absolutely nothing to challenge the trustworthiness of this composite report or even indicate that it is in any particular inaccurate, the report was properly received in evidence.* Of course, the report contains hearsay. But the very purpose of the Federal

Business Records Act, 28 U. S. C., Section 1732, is to make such hearsay admissible, subject to proof affecting the probative weight to be given to the document and its contents by the trier of the facts. It is particularly important that the rule be simply stated and easily applied in cases of aeroplane accidents where, more often than not, there are no survivors.'

The Pre-trial Order

As F. R. C. P. Rule 16 expressly provides that the pretrial order 'when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice,' I construe Judge Murphy's ruling as a refusal to modify Judge Bonsal's pre-trial order making Exhibit 15 admissible, but reserving the right of Sabena to introduce proof to contradict it. That a contrary ruling at trial would have caused rather than prevented manifest injustice seems to me to be clear. Judge Murphy's ruling was correct, despite the fact that he mistakenly supposed no foundation had been laid for the admission of Exhibit 15. But this is not to say that a trial judge has no power to change a ruling made at pre-trial. See Clark v. Pennsylvania Railroad Company, 2 Cir., 1964, 328 F. 2d 591; Dictograph Prods. Corp. v. Sonotone Corp., 2 Cir., 1956, 230 F. 2d 131, 134-36, petition for cert. dismissed, 352 U. S. 883."

In the case at bar, both the pre-trial judge and the trial judge ruled alike, albeit for different reasons. The academic question becomes moot since it is manifestly clear that the correct and just result was reached with justice rendered to the widow and children of Dr. LeRoy.

f. There Is No Conflict in the Decisions

Despite the fact that in the case at bar the question of the pre-trial ruling is moot, the defendant claims that this Court should review the question of pre-trial rulings, claiming there is a conflict of the decisions within the circuits.

The defendant correctly cites authorities holding that questions of evidence may be ruled upon at pre-trial (at page 5, paragraph 2 of the petition herein). But the defendant cites *Lynn* v. *Smith*, 281 F. 2d 501 (3d Cir. 1960) as contrary to that proposition and therefore claims that this Court should take jurisdiction on the basis of a conflict between the circuits.

It is respectfully submitted that no conflict exists in that the *Lynn* case is utterly inapplicable and can easily be distinguished. In the *Lynn* case the District Court ruled upon casual *unsworn remarks* made by the District Attorney at a pre-trial conference in an action for malicious prosecution. The Court dismissed the plaintiff's case solely upon the unsworn remarks of the District Attorney at pre-trial. The Court of Appeals for the Third Circuit held that this was error in that the jury was entitled to decide the case.

The *Lynn* case is far removed from the case at bar in which Judge Bonsal at pre-trial ruled upon *sworn* interrogatories and depositions taken of the defendant. These depositions and interrogatories were part of the case and taken specifically to reduce trial issues and crystalize the evidence.

It is respectfully submitted that no conflict exists between the circuits.

In addition to the cases and authorities supporting the proposition that the admissibility of evidence may be ruled

upon at pre-trial, as cited in the petitioner's brief (see authorities cited by petitioner at p. 5, para. 2 of the petition herein), several circuits have pointed out the need to strengthen pre-trials and eliminate baseless issues.

In *Holcomb* v. *Aetna Life Insurance Co.* (10 Cir. 1958), 255 F. 2d 577, cert. denied, 79 S. Ct. 118, page 580, the Court said:

> "Pre-trial conference is more than a mere conference in which the court seeks to eliminate groundless allegations or denials, and the Court has the power to compel the parties to agree to all facts concerning which there can be no real issue."

Speaking of pre-trial procedures, the Court stated recently in *Clark* v. *Pennsylvania Railroad Co.* (2 Cir. 1964), 328 F. 2d 591:

> "One of the prime objectives of this new, but now firmly established procedural device, is to do away with the old sporting theory of justice and substitute a more enlightened policy of putting the cards on the table, so to speak, and keeping surprise tactics down to a minimum".

The ruling of the judge at pre-trial was within his sound discretion and was eminently correct.

g. On the Certification of the Exhibit

During the trial below, plaintiff introduced Exhibit 15 which was a published copy of the radio transcript and bore the seal of the Italian Air Ministry. The defendant interposed a further objection that the copy was not certified. The Court of Appeals held that it was not necessary as the defendant had admitted its authenticity in the interrogatories and certification could have supplied no more.

Nevertheless, the plaintiff submitted a certified and authenticated copy of Exhibit 15 on the appeal. The certification was obtained subsequent to the trial.

The defendant characterized the authentication as spurious, claiming that the Italian government does not certify to private attorneys.

The defendant is well aware, through proceedings below, that the plaintiff obtained the certification and authentication through diplomatic channels, for the original transcript had already been certified by the Italian government to the Belgian government and the International Civil Aviation Organization.

The sham nature of the defendant's assertions may be gleaned from the fact that the defendant conceded that the exhibit was an exact copy of their transcript received from the Italian government. In fact, the depositions demonstrated that the defendant's Vice President had recognized the voices of the crew on the original tape recording.

The Court of Appeals said at p. 13a of petitioner's appendix B: "* * * but Sabena conceded that there is 'no discrepancy' between the exhibit and the appendix to the Italian government's report. Certification could have done no more." Thus, the certification was mere surplusage which did not alter the merits justifying admissibility into evidence of this exhibit which had been conceded as having "no discrepancy".

POINT II

The defendant was not entitled to a charge of presumption of due care by its crew.

The defendant claims that it was entitled to a charge that its crew was "presumed to be acting with due diligence and due care".

Defendant cites in support of this proposition cases from other circuits.

State law applies in the Federal Court as to presumptions (Bender's N. Y. Law & Proof, Section 230.10) as they affect the burden of proof. In New York, indeed, a presumption of the defendant's negligence arises in the event of an airplane crash, and the doctrine of *res ipsa loquitur* is invoked so as to draw the *presumption of negligence upon the part of the defendant* (*Citrola* v. *Eastern Air Lines Inc.*, 264 F. 2d 815 (2d Cir. 1959)).

Accordingly, the trial court was correct in denying this request to charge a presumption of due care upon the part of the crew and, in lieu thereof, he held this to be a question of fact which would be a proper subject of final argument to the jury rather than a matter of law to be drawn as a presumption in the defendant's favor (S. M. 853, 854 and 855).

The Court of Appeals agreed that the trial court was not required to so charge.

It is further submitted that the New York law is good law in that in airplane accident cases there is frequently very little direct evidence of the circumstances of the accident. The airline has control of the airplane, and frequently has most of the attendant facts and circumstances

within its own possession and control. Whether or not to apply the doctrine of *res ipsa loquitur* depends upon the procedural law and rules in each state.

Since New York does not entertain a presumption of due care on the part of a deceased crew as against a deceased passenger, the courts below ruled correctly. This Court should not be called upon to make questions of evidence and procedure uniform in civil cases in the fifty states.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, N. Y.
September 7th, 1965.

END